2. On July 2, 2004, the district court would deny both of Petitioner's Rule 60(b) motion (challenging the integrity of its July 17, 2000 decision denying Petitioner's 28 U.S.C. § 2255 motion relating to ineffective assistance of counsel grounds) and at the same time deny the issuance of a COA before it was filed as authorized by Local Rule 22.2, Third Circuit's Local Rule.

3. On July 16, 2004, Petitioner would timely file a Rule 52(b) and 59(e) motion, i.e., calling into question the district court's conclusion that Petitioner was reraising his ineffective claim oppose to the manner and means in which the district court had adjudicated the ineffective claims. In addition, Petitioner would object to the district court ruling upon the COA before it was filed contrary to Rule 22(b), Fed. R. App. Proc.

4. On August 5, 2004, the district court would issue an order entered August 6, 2004, denying Petitioner's Rule 52(b) and 59(e) motion continuing to override the nature of Petitioner's Rule 60(b) motion to challenging the underlying conviction opposed to its July 17, 2000 judgment. See August 5, 2004 Order.

5. On August 16, 2004, Petitioner would file a timely notice of appeal, appealing the July 2, 2004 and August 6, 2004 Orders.

6. Thereafter, on September 2, 2004, Petitioner filed a COA to the Court of Appeals for the Third Circuit.

7. On February 17, 2005, the Third Circuit would deny Petitioner's request for a COA by an esoteric term: "To the extent that a certificate of appealability is required for this appeal." See Appendix A, Order of February 17, 2005.

8. On March 11, 2005, Petitioner would file a timely petition for rehearing.

9. On May 11, 2005 the Court of Appeals would deny rehearing, See Appendix C1-2, Order of May 11, 2005. 5.

10. On July 25, 2005 Petitioner sought an extension of time to file his writ of certiorari, by Order dated August 2, 2005, Petitioner was granted an extension to and including October 8, 2005. This request for a writ of certiorari follows seeking relief from the court of appeals February 17, 2005 Order denying the issuance of COA upon obsolete perceptions of 28 U.S.C. § 2255 and Rule 60(b).

REASONS FOR GRANTING THE PETITION

1. Whether The Court of Appeals for The Third Circuit's May 11, 2005 Order Absent The Guidance of This Court's Most Recent Decisions Correcting The Interpretation of 28 U.S.C. § 2255¶6(3) and Rule 60(b) of the Federal Rules of Civil Procedure Should Continue to Stand as an Outstanding Fugitive Decision Administering Federal Law/Rule?

a. The Incorrect Administration of 28 U.S.C. § 2255¶6(3) by The Lower Courts Prior to Dodd.

Prior to Dodd, practically every Circuit Court would entertain the dismissal of a claim deemed by the district court as a second or successive motion subject to authorization of 28 U.S.C. § 2244. That is, no matter whether the intervening change of decisional law occurred during the Section 2255 proceeding, after the district court entered judgment, during appellate stage or when the proceedings became final. *See e.g., U.S. v. Thomas*, 221 F.3d 430 (3rd Cir. 2000) (Allowing amendment or supplement to amplify or clarify facts of original claim, but barring new claims past one year statute of limitations, i.e., ¶6(1)). Following the district court's dismissal without prejudice, should a federal prisoner file a request for permission to file a second or successive motion. The appellate courts in turn would deny permission under the terms of Section 2255¶8(1) or (2) and the matter would be closed unreviewable by petition for rehearing or certiorari review as a matter of law. *See* 28 U.S.C. § 2244(b)(3) (E):

> (E) The grant or denial of an authorization by a court of appeals to file a second or successive

> application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

Moreover, this Court when it interpreted Section 2244(b)(2) (A) in *Tyler v. Cain*, 533 U.S. 656, 662, 150 L. Ed. 2d 632, 121 S. Ct. 2478 (2001), encouraged the lower courts in Section 2255 proceedings to give ¶8(2)'s similar language the same construction. However, the lower federal courts were disregarding Section 2244(a)'s exception clause:

> "except as provided in Section 2255." The exceptions in Section 2255 are ¶6(2), (3) and (4), most recently this Court gave judicial construction to ¶16(3) and (4) exceptions. See Dodd v. United States, supra, ¶6(3) and Johnson v. United States, 125 S. Ct. 1571 (2005). This instant case, involves ¶6(3)'s exception and administration by the lower federal courts. The Court of Appeals for the Third Circuit May 11, 2005 order is a paradigm of this incorrect administration of federal law. *Cf. Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (stating that raising such an issue before the Court is particularly appropriate where the question (1) is in "a state of evolving definition and uncertainty," and (2) is "one of importance to the administration of federal law").

As such, the May 11, 2005 Order denying Petitioner's COA stands as an outstanding fugitive decision to the correct administration of federal law under 28 U.S.C. § 2255¶6(3). That is, in light of Dodd, "reasonable jurist would find the district court's assessment of the constitutional claims

debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000). A writ of certiorari should issue on this aspect of the May 11, 2005 Order.

b. Incorrect Administration of Rule 60(b) Motions by the Lower Court's Prior to Gonzalez Was Repugnant to the Text, Structure and Traditions of U.S. Const., Art. III, § 2, Cl. [1]

The district court has authority to grant equitable relief from an unjust judgment given its inherent authority over its own judgments which finds expression through Fed. R. Civ. P. 60(b), and which is confirmed by 28 U.S.C. § 2255 and its counterpart 2243. *Cf. Hamdi v. Rumsfeld*, 542 U.S. __, 159 L. Ed. 2d 578, at 596, 124 S. Ct. __ (2004) ("[A]ll agree that § 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review. Most notably, § 2243 [¶] provides . . ." The district court has inherent authority over its judgment which derives from Article III and provides authority to ensure the fundamental justice of its own judgments. *See e.g., Gondeck v. Pan Am. World Airways*, 382 U.S. 25, at 27, 15 L. Ed. 2d 21, 86 S. Ct. 153 (1965) (citing *United States v. Ohio Power Co.*, 353 U.S. 98, 99, 1 L. Ed. 2d 183, 77 S. Ct. 652 (1957)) ("the interests of justice would Make unfair the strict application of our rules.").

This Court recognized just recently in *Nelson v. Adam USA, Inc.*, 529 U.S. 460, at 465, 146 L. Ed. 2d 530, 120 S. Ct. 1573 (2000):

> "The Federal Rules of Civil Procedure are designed to further the due process of law that the constitution guarantees." This being so,

> Rule 60(b) operates as a portal to revisiting a judgment whose unfairness is not discovered until after its rendition. *Cf. Liljeberg v. Health Services Corp.*, 486 U.S. 847, 867, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988) ("[B]y his silence, Judge Collins deprived respondents of a basis for making timely motion for a new trial and also deprived it of on direct appeal.").

There's an analogy here, the Third Circuit's en banc decision *U.S. v. Cepero*, 224 F.3d 256, 267-68. (3rd Cir. 2000) (allegation that sentencing court misapplied Sentencing Guidelines did not present constitutional issue for which a certificate of appealability could be granted). *See also, U.S. v. Edwards*, 309 F.3d 110, 113 (3rd Cir. 2002) (Treating Rule 60(b) motion in same manner, citing *United States v. Cepero, supra* at 267-68.

Since the lower courts misinterpreted Rule 60(b) after the enactment of the Antiterrorism Effective Death Penalty Act of 1996 ("AEDPA"), this Petitioner stands amongst the class of habeas petitioners deprived of the correct administration of Rule 60(b) as held in Gonzalez, supra. *See, e.g., Gondeck, supra* at 27. A writ of certiorari should issue herein to bring into conformity the May 11, 2005 Order of the court of appeals, an outstanding fugitive decision of' the correct administration of Rule 60(b).

2. Whether The Court of Appeals for the Third Circuit Local Rule 22.2 Conflicts With The Established National Rule 22(b) of the Federal Rules of Appellate Procedure in Violation of Rule 47 of the Same Rules?

The given judicial construction to 28 U.S.C. § 2253(c) in *Slack v. McDaniel, supra* at 482 held; "Under AEDPA, an appellate case is commenced when the application for COA is filed." Furthermore, Rule 22(b), Fed. R. App. Proc., reads in pertinent part:

> "[I]f an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue."

Inconsistent to Rule 22(b), is the Third Circuit's Local Rule 22.2 which authorizes the district court to enter judgment on a COA prior to the filing of a notice of appeal being filed by an applicant. See Appendix B-B1-2, Order of July 8, 2004 entered July 9, 2004. The Third Circuit's Local Rule 22.2 reads in pertinent part:

> **"22.2 Statement of Reasons for Certificate of Appealability.** At the time a final order denying a petition under 28 U.S.C. § 2254 or § 2255 is issued, the district judge shall make a determination as to whether a certificate of appealability should issue." This Local Rule 22.2 conforms to the Third Circuit's precedent *U.S. v. Cepero, supra* at 267-68 (concluding it lacked jurisdiction under § 2253(c) where sentencing court misapplied sentencing guidelines). But, *See Glover v. United States*, 531 U.S. 198, 203- 04,

> 148 L. Ed. 2d 604, 121 S. Ct. 696 (2001), holding to the contrary. Local Rule 22.2 also reflects the Third Circuit's decision in *U.S. v. Edwards*, 309 F.3d 110, 113 (3rd Cir. 2002) Citing *Morris v. Horn*, 9. 187 F.3d 333, 339 (3rd Cir. 1999); *United States v. Cepero*, 224 F.3d 256, 267-68 (3rd Cir. 2000): "Moreover, even if the District Court had entertained Edwards motion as one filed pursuant Rule 60(b) . . . presumably the motion would have met with the same fate given the District Court's determination that Amendment 634 was a substantive one. As for Edwards' chance of success on appeal from such a denial, we note that he would not even have progressed as far as the briefing schedule."

Because the Third Circuit held in *Cepero, supra* at 267-68 it lacked jurisdiction under Section 2253(c) to hear nonconstitutional claims. Local Rule 22.2 eviscerates the Federal Rules of Civil Procedure 52(b), 59(e) or 60(b) motion filed within ten days or a Rule 60(b) motion after ten days in a COA proceeding because they are nonconstitutional claims. *See Edwards, supra* at 113; *also, see Marshal v. Hendricks*, 307 F.3d 36, at 81 (3rd Cir. 2002) (citing United States v. Cepero, supra at 262-63, 267.

> "we construed Slack and the plain language of 28 U.S.C. § 2253(c) to deprive us of jurisdiction to hear statutory questions pursuant to habeas appeals. In response to the ad terrorem argument that the defendant is thereby totally denied the opportunity to appeal nonconstitutional issues, the short answer is that Congress has indicated that

> the issues must be presented in the direct appeal from the conviction."

Id. at 205).

Contrary to Cepero, this Court held in Slack, supra at 483: "Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal." *Id.* at 483. In fact as a matter of law, the "substantial showing" encompassing the traditional standards of review such as de novo and abuse of discretion, no doubt being reasonable is when a court acts according to law, i.e., absent being clearly erroneous or abusing its discretion. The Third Circuit equates the "substantial showing as the constitutional right itself rather than the manner and means of assessing the Constitutional right.

Local Rule 22.2 conflicts with the nationally established procedure of Rule 22(b) of the Fed. R. App. Proc., in violation of the National Rule 47, Fed. R. App. Proc. *See United States v. Griffin*, 699 F.2d 1102, at 1109 (11th Cir. 1983):

> "Whereas, as here, a perfectly adequate, indeed superior, judicial procedure agreeable to the Constitution has been established for presentation and determination of an issue, our duty to all of the interests involved, lies not in devising or permitting a fugitive procedure of our own design but in requiring adherence to the procedure established."

It can not be disputed that Local Rule 22.2 displaces the procedure under Rule 52(b) to assert error that the District

Court's factual findings does not support its conclusions of law; and, Rule 59(e)'s provision to modify, alter or amend the judgment based upon a manifest error of law or fact. In addition, Rule 60(b)'s broader provisions for relief from the judgment.

This displacement of the above Rules on its face seems harmless, but its not. Here's why, in seeking reconsideration of a denial of a COA, an applicant faces a higher hurdle than an initial request for a COA. The appellant must now surmount Rule 59(e)'s standard which is a high standard, i.e., far above and distinct from that of a COA. *See e.g., Castro v. U.S.*, 310. F.3d 900, at 904 (6th Cir. 2002) (Kennedy, Cir. J., concurring) ("Third, while the petitioner may move for reconsideration where the COA is entered with the opinion, the burden on the petitioner to persuade the judge to change a ruling is greater than the burden to [COA]"). As noted above, a lot comes before the COA stage, Rule 22(b), Fed. R. App. Proc., the nationally established rule of procedure recognizes such, ct. *Nelson v. Adams Inc., supra* at 468 & n. 2 ("Nelson was never afforded a proper opportunity to respond to the [judgment] against him."). Likewise, on July 9, 2004, the Petitioner was not afforded an opportunity to respond to the judgment against his Rule 60(b) motion. Instead, Petitioner was "systematically" slung into the COA stage, i.e., "presumably the motion would me[e]t with the same fate," *U.S. v. Edwards, supra* at 113, as all Rule 60(b) motions in the Third Circuit under Cepero, supra. This unfair administration of federal law needs to be corrected; because it allows a district court unfettered discretion in the assessing claims arguably related to the vindication of a constitutional right. *See Slack v. McDaniel*,

supra at 483. 11. entertain a nonconstitutional issue. This Court in *Slack v. McDaniel, supra* at 483, outright rejected such:

> "We reject this interpretation. The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a COA under § 2253(c) Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal."

The justice's of this Court would find debatable if not wrong Local Rule 22.2's administration of federal law to deprive a petitioner of those procedures agreeable to the Constitution. Local Rule 22.2 is a fugitive procedure of the Third Circuit's own design to enforce its own precedents. A writ of certiorari should issue on this issue.

CONCLUSION

The Petition for a Writ of Certiorari should be granted inclusively.

Respectfully submitted,

NATHANIEL SWINT, PRO SE
Reg. No. 34469-066 Unit 3B
U.S. Penitentiary Allenwood
P.O. Box 3000
White Deer, PA 17887-3000

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 17, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **04-3403**

UNITED STATES OF AMERICA

v.

SWINT
Nathaniel Swint,

Appellant

(ED/PA Criminal No. 97-cr-00276-1)
(Criminal Treated as Civil)

Present: RENDELL, FISHER and VAN ANTWERPEN, *Circuit Judges.*

Submitted are

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

(2) Appellant's memorandum in support, in the above-captioned case.

Appendix A

Respectfully,

Clerk

MMW/SR/slc

ORDER

To the extent that a certificate of appealability is required for this appeal, the foregoing request is denied because jurists of reason would not disagree with the District Court's denial of the appellant's "motion to make additional findings." *Slack v. McDaniel*, 529 U.S. 473 (2000). Otherwise, the District Court's order is summarily affirmed.

By the Court,

/s/ Majorie O. Rendell
Circuit Judge

Dated: February 17, 2005
SLC/cc: Mr. Nathaniel Swint, #34469-066
Kristin R. Hayes, Esq.

APPENDIX B — ORDER AND MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION

NO. 94-276

CIVIL ACTION

NO. 98-5788

UNITED STATES OF AMERICA,

Plaintiff,

v.

NATHANIEL SWINT,

Defendant.

ORDER AND MEMORANDUM

ORDER

AND NOW, this 2nd day of July, 2004, upon consideration of petitioner's Motion to be Relieved of This Court's Order Arguably Related to Movant's Substantive Right of Assistance of Counsel Adjudicated Incorrectly in

Appendix B

Movant's 28 U.S.C. § 2255 Proceeding in Light of *Wiggins v. Smith* and *Massaro v. United States* (Document No. 296, filed June 28, 2004), identified by petitioner and treated by the Court as a Motion under Federal Rule of Civil Procedure 60(b), **IT IS ORDERED** that Nathaniel Swint's Motion to be Relieved of This Court's Order Arguably Related to Movant's Substantive Right of Assistance of Counsel Adjudicated Incorrectly in Movant's 28 U.S.C. § 2255 Proceeding in Light of *Wiggins v. Smith* and *Massaro v. United States*, identified by petitioner and treated by the Court as a Motion under Federal Rule of Civil Procedure 60(b), is **DISMISSED**.

IT IS FURTHER ORDERED that a certificate of appealability will not issue on the ground that petitioner has not made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c). This part of the order is **WITHOUT PREJUDICE** to the right of Nathaniel Swint to file an application with the Court of Appeals seeking an order pursuant to 28 U.S.C. § 2244(b)(3) authorizing this Court to consider his Motion to be Relieved of This Court's Order Arguably Related to Movant's Substantive Right of Assistance of Counsel Adjudicated Incorrectly in Movant's 28 U.S.C. § 2255 Proceeding in Light of *Wiggins v. Smith* and *Massaro v. United States*, identified by petitioner and treated by the Court as a Motion under Federal Rule of Civil Procedure 60(b).

Appendix B

MEMORANDUM

I. DISCUSSION

The pending Motion under Rule 60(b) raises issues identical to those presented to the Court by petitioner's Motion to Vacate, Set Aside or Correct his Sentence pursuant to 28 U.S.C. § 2255. All claims set forth in the § 2255 Motion, and presented again in the pending Motion, were rejected by the Court by Order dated July 17, 2000. Petitioner appealed the July 17, 2000 Order, and while his case was on appeal, filed numerous motions in this Court seeking relief from the July 17, 2000 Order. All such Motions were denied and appealed by petitioner.

By Order dated October 29, 2001, the Court of Appeals denied petitioner's Application for a Certificate of Appealability on the ground that he failed to make "a substantial showing of a denial of a constitutional right," under 28 U.S.C. § 2253(c)(2). Continuing, the Order of the Court of Appeals stated that "The claims in Swint's Sec. 2255 motion, as amended and supplemented, are meritless. The District Court correctly denied: (1) the motion pursuant to Fed. R. Civ. P. 52(b) and 59(e) and the motion to amend; (2) the motion to expand the record with a request for an evidentiary hearing; and (3) the motion to make additional findings in light of *ZZ_Williams ZZ_ v. ZZ_ Taylor*, 529 U.S. 362 (2000) and the motion on objection pursuant to Fed. R. Civ. P. 46."

The pending Motion seeks to rehash issues previously presented to this Court and the Court of Appeals and rejected.

Moreover, the pending Motion under Federal Rule of Civil Procedure 60(b) constitutes a second or successive habeas corpus motion and, as such, petitioner is required to file an application with the Court of Appeals seeking an order pursuant to 28 U.S.C. § 2244(b)(3) authorizing this Court to consider the Motion. The decision of this Court that the pending Rule 60(b) Motion is a second or successive habeas corpus motion requiring prior approval of the Court of Appeals, is based on the determination that the Motion challenges petitioner's underlying conviction. *Pridgen v. Shannon*, 2002 U.S. Dist. LEXIS 18589, at *3 (E.D. Pa. Sept. 27, 2002); *Rodwell v. Pepe*, 324 F.3d 66, 71 (1st Cir. 2003); and, *Dunlap v. Litscher*, 301 F.3d 1082 (7th Cir. 1999).

II. CONCLUSION

Nathaniel Swint's Motion under Rule 60(b) is dismissed for all of the foregoing reasons.

BY THE COURT:

s/ Jan E. DuBois, J.
JAN E. DuBOIS, J.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION

NO. 94-276

CIVIL ACTION

NO. 98-5788

UNITED STATES OF AMERICA,

Plaintiff,

v.

NATHANIEL SWINT,

Defendant.

ORDER

AND NOW, this 5th day of August, 2004, upon consideration of defendant, Nathaniel Swint's, *pro se* Motion to Make Additional Findings as to the Court's Misapprehension as to the Procedural and Equitable Nature of Petitioner's Pleading to Impeach the Adjudication Rendered July 17, 2000 Over Petitioner's Ineffective Claims. In Addition, to Reconsider the Denial of a Certificate of Appealability Which was Never Filed/Triggered by Notice

of Appeal (Document No. 298, filed July 21, 2004), and the record in the case, **IT IS ORDERED** that defendant, Nathaniel Swint's, *pro se* Motion to Make Additional Findings as to the Court's Misapprehensions as to the Procedural and Equitable Nature of Petitioner's Pleading to Impeach the Adjudication Rendered July 17, 2000 Over Petitioner's Ineffective Claims. In Addition, to Reconsider the Denial of a Certificate of Appealability Which was Never Filed/Triggered by Notice of Appeal is **DENIED**.

The denial of Nathaniel Swint's *pro se* Motion is based on the following:

By Order dated July 2, 2004, the Court denied petitioner's *pro se* Motion to be Relieved of This Court's Order Arguably Related to Movant's Substantive Right of Assistance of Counsel Adjudicated Incorrectly in Movant's 28 U.S.C. § 2255 Proceeding in Light of *Wiggins v. Smith* and *Massaro v. United States*. The Motion presently pending argues, based on *Wiggins v. Smith* and *Massaro v. United States*, that the Court erred in concluding in its July 2, 2004 Order that his *pro se* Motion under Federal Rule of Civil Procedure 60(b) was a second or successive habeas corpus motion which required him to file an application with the Court of Appeals seeking an order pursuant to 28 U.S.C. § 2244(b)(3) authorizing this Court to consider the Motion. The Court rejects this most recent attempt to reverse defendant's conviction which has been reviewed by the Court on numerous occasions.

The pending *pro se* Motion addresses the question of ineffective assistance of counsel at defendant's trial. There can be no doubt that, under *Pridgen v. Shannon*, 2002 U.S. Dist LEXIS 18589, at *3 (E.D. Pa. Sept. 27, 2002); *Rodwell v. Pepe*, 324 F.3d

66, 71 (1st Cir. 2003); and, *Dunlap v. Litscher*, 301 F.3d 1082 (7th Cir. 1999), cited in the Court's July 2, 2004 Memorandum, that, under such circumstances, the Rule 60(b) Motion constitutes a second or successive habeas corpus motion. As such, petitioner is required to file an application with the Court of Appeals seeking authorization for this Court to consider the Motion. *See* 28 U.S.C. § 2244(b)(3). Because defendant has failed to do so, he is not entitled to the relief he seeks.

BY THE COURT:

s/ Jan E. DuBois
JAN E. DuBOIS, J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 11, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-3403

UNITED STATES OF AMERICA

v.

NATE SWINT

Nathaniel Swint,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 94-cr-00276-1)
District Judge: Hon. Jan E. DuBois

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, and VAN ANTWERPEN, *Circuit Judges.*

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by *pro se* Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit

judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ *Majorie O. Rendell*
Circuit Judge

Dated: May 11, 2005
SLC/cc: Mr. Nathaniel Swint
Kristin R. Hayes, Esq.